

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TERRENCE CARTER,

Defendant-Appellant.

UNPUBLISHED

December 17, 2013

No. 311596

Wayne Circuit Court

LC No. 12-002263-FC

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age).¹ Because defendant was not denied the effective assistance of counsel, the evidence was sufficient to support his conviction, and defendant is not entitled to relief on the basis of newly discovered evidence, we affirm.

Defendant first argues that he was denied the effective assistance of counsel. Whether a defendant received the effective assistance of counsel is generally “a mixed question of fact and constitutional law.” *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court’s findings of fact, if any, for clear error and reviews questions of law de novo. *Heft*, 299 Mich App at 80. Because defendant did not preserve this issue for our review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to mistakes apparent on the record. *Id.*

The United States and Michigan Constitutions grant criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The defendant has the burden of proving that counsel rendered ineffective assistance. *Heft*, 299 Mich App at 80. To prove ineffective assistance of counsel, the defendant must first demonstrate that “defense counsel’s performance was so deficient that it fell below an objective standard of reasonableness” *Id.* at 81. Second, the defendant must show that “there is a reasonable probability that

¹ The jury acquitted defendant of a second charge of first-degree criminal sexual conduct involving the same victim.

defense counsel's deficient performance prejudiced the defendant." *Id.* "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id.*

Defendant argues that his trial attorney rendered ineffective assistance of counsel because he failed to properly prepare two of defendant's character witnesses to testify. Specifically, defendant asserts that counsel failed to inform the witnesses that defendant provided a statement to the police confessing to the crime and that defendant had engaged in an extramarital affair with the victim's mother. Defendant contends that counsel's failure to properly interview and prepare the witnesses for their testimony led to his conviction.

Our review of the record shows that defense counsel made valid, strategic choices regarding his calling and examination of defendant's character witnesses. Counsel called 19-year-old Yasmine Ibarra, defendant's step-daughter, to testify. Ibarra testified that she had known defendant since she was six months old and that defendant was married to her mother. Ibarra further testified that she lived with her mother and defendant from the time that she was 4 years old until she went away to college when she was 18 years old. Ibarra maintained that defendant never touched her inappropriately or made her feel uncomfortable. Contrary to defendant's assertion, Ibarra was not surprised to learn about defendant's infidelity during her cross-examination. Rather, Ibarra testified that she did not know about defendant's infidelity until trial. The prosecutor did not inform Ibarra of defendant's infidelity while questioning her. Further, when the prosecutor asked Ibarra whether she knew that defendant had confessed to molesting a six-year-old, Ibarra responded, "[n]o." Ibarra's answer was consistent with defendant's theory that he did not confess to the crime and that he made his statements to the police merely to confirm that he understood what was being alleged against him. Thus, our review of the record shows that counsel exercised sound trial strategy with respect to his questioning of Ibarra and that counsel's performance did not fall below an objective standard of reasonableness. Moreover, because Ibarra's testimony was consistent with defendant's theory of defense, it did not prejudice defendant.

The record also shows that counsel exercised sound trial strategy when he called and questioned Nicole Carter, defendant's wife and Ibarra's mother. Carter testified that she was never concerned when defendant was alone with Ibarra when Ibarra was a child and that she could not think of any instances when she suspected that defendant may have "done something" to Ibarra. Contrary to defendant's suggestion, Carter was aware of defendant's infidelity before she testified. Carter testified that she learned of defendant's infidelity before trial, after he was arrested. Carter's testimony also indicated that she did not believe that defendant confessed to molesting the victim, "RM." Carter testified as follows:

Q. So after you found out about the infidelity, you realized you didn't know this man as well as you thought you did?

A. After I found out. I didn't realize that he was cheating on me.

Q. Okay.

A. You're right. But he's not, he's not a child molester or pedophile, I'm sorry.

Q. So if he confessed to being a child molester, would you have to agree that he's a child molester?

A. If he confessed to it yes. But I know Terrence.

Q. Ma'am.

A. I've been with Terrence for 19 years.

Q. Ma'am, yes or no? If he confessed to molesting a six year old, would that make him a child molester?

A. If he confessed to me that he [w]as a child molester to a six year old, yes. That would make him a molester.

Carter's testimony conveyed her belief that defendant did not molest a child and was consistent with defendant's theory that he did not confess to sexually assaulting RM. Accordingly, the record shows that defense counsel exercised sound trial strategy in calling and questioning Carter, and Carter's testimony supported defendant's defense. Defendant has thus failed to show that counsel's performance fell below an objective standard of reasonableness or that defendant was prejudiced. Therefore, defendant was not denied the effective assistance of counsel.

Defendant next argues that the evidence was insufficient to support his conviction. We review "de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012) (quotation marks and citation omitted). We review the evidence in the light most favorable to the prosecution and resolve all evidentiary conflicts in the prosecution's favor. *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012); *Lockett*, 295 Mich App at 180.

In order to prove first-degree criminal sexual conduct under MCL 750.520b(1)(a), the prosecution must show "that (1) the defendant engaged in sexual penetration with another person and (2) the other person was under 13 years of age." *Lockett*, 295 Mich at 187. "Sexual penetration" is defined as "'sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any person's body . . .'" *Id.*, quoting MCL 750.520a(r).

The evidence was sufficient prove, beyond a reasonable doubt, that defendant engaged in sexual penetration with RM when she was under 13 years of age. RM was seven years old at the time of trial. She testified that defendant forced her to put his penis into her mouth when she was six years old. She further testified that, while defendant's penis was in her mouth, he put his hand on her hair and moved her head up and down. RM's mother testified that she walked into the room and saw RM's head between defendant's legs while defendant's penis was out of his pants. Moreover, defendant initialed a statement to the police in which he admitted that he forced RM to put his penis in her mouth, described how he forced her to put his penis in her mouth, and admitted that his penis was in RM's mouth for approximately 30 seconds. Although

defendant denied making those admissions during trial and claimed that he merely confirmed that he understood the allegations against him, the evidence viewed in the light most favorable to the prosecution was sufficient for a rational trier of fact to conclude that the essential elements of the crime were proven beyond a reasonable doubt.

Further, defendant's argument that the jury verdicts were inconsistent because the evidence regarding each of the first-degree criminal sexual conduct charges was essentially the same lacks merit. The jury acquitted defendant of one charge and convicted him of the other. Contrary to defendant's argument, the evidence presented regarding the charges was not essentially the same. RM testified that defendant made her put his penis in her mouth one time when she was five or six years old, but she could not remember the exact details of the incident, including where it occurred. Regarding the incident of which defendant was convicted, however, RM testified that defendant forced her to put his penis in her mouth in her living room, and she described the manner in which defendant moved her head up and down. In addition, RM's mother testified that she walked into the living room and saw RM's head between defendant's legs while defendant's penis was out of his pants. Accordingly, the jury verdicts were not inconsistent.

Finally, defendant argues in his standard 4 brief on appeal that his conviction should be reversed and the charge against him dismissed based on an affidavit that RM's mother signed after trial. In the affidavit, RM's mother claimed that she did not want to press charges against defendant, but the prosecutor and the police threatened to call Child Protective Services if she did not. RM's mother further averred:

I only reported the crime on what my daughter told me and what I thought I saw. My daughter later told me that the assault never happened.

Defendant contends that the affidavit constitutes newly discovered evidence.

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); MCR 6.508(D). [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).]

"However, where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). "Michigan courts have expressed reluctance to grant new trials on the basis of recanting testimony." *Id.* at 560.

The affidavit is akin to RM's mother recanting her trial testimony. Although RM's mother testified that she did not see RM's mouth on defendant's penis, she testified that RM's head was between defendant's legs and defendant's "penis was out." The affidavit itself is newly discovered because it was not executed until more than one year after defendant's trial. The assertion that RM told her mother that the assault never happened, however, is not

necessarily newly discovered because it is unclear when RM made the alleged statement. The affidavit merely indicates that RM told her mother about the sexual assault and “later” told her mother that it never happened. Thus, it is unclear whether RM’s statement that the assault never happened was made before or after trial. In addition, the affidavit merely contradicts and casts doubt on RM’s and her mother’s trial testimony. When the sole purpose of newly discovered evidence is to impeach a witness, the evidence is cumulative. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). In any event, the new evidence would not make a different result probable on retrial considering that defendant admitted forcing RM to put his penis in her mouth and RM’s mother walked into the room and observed RM’s head between defendant’s legs while his penis was out of his pants. Accordingly, defendant is not entitled to the reversal of his conviction on the basis of the affidavit.

Affirmed.

/s/ Mark T. Boonstra

/s/ Pat M. Donofrio

/s/ Jane M. Beckering